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MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-5140

MICHAEL J. CASSIUS,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF ARIZONA

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The opinion of the Supreme Court of the State of Arizona (App. 46) is reported at 110 Ariz. 485, 520 P.2d 1109 (1974); and the opinion of the Court of Appeals of the State of Arizona, Division Two, (App. 30) is reported at 21 Ariz.App. 78, 515 .P.2d 903 (1973).

JURISDICTION

The judgment of the Supreme Court of the State of Arizona was entered on April 16, 1974. A timely motion for rehearing was denied on May 21, 1974. A Petition for a Writ of Certiorari and Motion to Proceed in Forma Pauperis were filed with this Court on August 13, 1974; the petition and motion were granted on October 15, 1974. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides in pertinent part:

> ". . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . ."

Section One of the Fourteenth Amendment of the United States Constitution provides in pertinent part:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Eighth Amendment of the United States Constitution provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Article I, Section 10 of the United States Constitution provides in pertinent part:

"No State shall . . . pass any Bill of Attainder . . . ."

Article 2, Section 22 of the Arizona Constitution, (*Ariz. Rev. Stat.Ann.*, Vol. 1, Supp. 1974 at 90) and § 13-1580 of the *Arizona Revised Statutes Annotated* (*Ariz. Rev.Stat.Ann.*, Vol. 5, Supp. 1973 at 328), are set forth below:

Arizona Constitution, art. 2, § 22:

"All persons charged with crime shall be bailable by sufficient sureties, except for:

1. Capital offenses when the proof is evident or the presumption great.

2. Felony offenses, committed when the person charged is already admitted to bail on a separate felony charge and where the proof is evident or the presumption great as to the present charge."

Ariz.Rev.Stat.Ann. § 13-1580:

"A person who is convicted of committing any felony offense, whether federal or state, which felony offense is committed while such person is released on bail or his own recognizance on a separate felony charge, is guilty of the offense of committing a felony while released on bail or his own recognizance and upon conviction of such crime shall be punished by imprisonment in the state prison for not more than five years. Such penalty shall be in addition to and shall be served consecutively to any penalty imposed for the offense committed while released on bail or on his own recognizance."

QUESTIONS PRESENTED

1. Did not petitioner's conviction of "committing a felony while on bail on felony charge," *Ariz.Rev.Stat. Ann.* § 13-1580, violate petitioner's rights under the Double Jeopardy Clause of the Fifth Amendment, as applied to the States through the Fourteenth Amendment to the Constitution?

2. Did not petitioner's conviction of "committing a felony while on bail on felony charge," *Ariz.Rev.Stat. Ann.* § 13-1580, violate petitioner's rights under the Equal Protection Clause of the Fourteenth Amendment to the Constitution?

STATEMENT

On October 17, 1972, petitioner, then 21 years old, was arrested and charged with burglary of a motor vehicle. The following day, he was released on his own recognizance. Case number A-22479 was subsequently assigned to this matter.

On the evening of November 4, 1972, while released on his own recognizance on the first charge, petitioner was arrested at the scene of an apparent store burglary. Petitioner was charged, Case No. A-22303, with two counts: Count I, First Degree Burglary (*Ariz.Rev.Stat. Ann.* § 13-302 (Supp. 1973)), and Count II, "committing a felony while on bail on felony charge" (*Ariz.Rev.Stat.Ann.* § 13-1580 (Supp. 1973)).

Proceedings were held on January 4, 1973, at which time, pursuant to a plea agreement, the charge in Case No. A-22479 was dismissed on the prosecutor's motion

and petitioner pleaded guilty to Count I of Case No. A-22303. Count II of Case No. A-22303 was submitted to the court on stipulated facts, the court being advised that "the public defender would like to reserve their right to examine that Statute on appeal" (App. 13). The sole stipulation accepted by the court was that petitioner had been released on his own recognizance in Case No. A-22479 on October 18, 1972, by the Justice Court, and had remained released on that charge until January 4, 1973, a stipulation which was only necessary because the court's file contained no formal release order (App. 13-14). Petitioner was found guilty.

On January 22, 1973, petitioner was sentenced to imprisonment under Count I for not less than one nor more than two years, and to a consecutive term under Count II of not less than one nor more than three years.

On appeal, petitioner argued in his briefs that his conviction under Count II violated the Constitutional protection against double jeopardy. The Arizona Court of Appeals, on November 8, 1973, reversed petitioner's conviction under Count II (*Ariz.Rev.Stat.Ann.* § 13-1580), holding, after raising the issue sua sponte, § 13-1580 violative of the Equal Protection Clause of the Fourteenth Amendment, and refusing to consider, holding it not properly preserved for appeal, petitioner's claim that the statute also subjected him to double jeopardy. *State v. Cassius*, 21 Ariz.App. 78, 515 P.2d 903 (1973) (App. 30).

The Arizona Supreme Court granted a Petition for Review by the State and petitioner, thereafter, obtained permission to file a memorandum of additional argument in which he argued both the claim of double

jeopardy and that of denial of equal protection. On April 16, 1974, the Arizona Supreme Court vacated the Court of Appeals' decision and affirmed petitioner's conviction. The Arizona Supreme Court expressly considered and rejected both petitioner's claims of double jeopardy and of denial of equal protection. *State v. Cassius,* 110 Ariz. 485, 520 P.2d 1109 (1974) (App. 46).

On October 15, 1974, this Court granted petitioner's Petition for a Writ of Certiorari.

SUMMARY OF ARGUMENTS

I. DOUBLE JEOPARDY

Ariz.Rev.Stat.Ann. § 13-1580 makes a person who is convicted of a felony also guilty of the crime of committing a felony while on bond or recognizance if the felony was committed at a time when the defendant was released on bond or recognizance on another felony charge. Although the Arizona courts have failed to specify what the elements of a § 13-1580 offense are, the only possible element in the traditional legal meaning of the term is the commission of the underlying felony. The constituent elements of the underlying felony are the same as their sum total, commission of the felony. Thus, the offenses are the same.

If, as the State contends, the statuses of having a conviction for a felony and of having been released on bond or recognizance on another felony charge at the time the felony was committed are the elements of

§ 13-1580, then the statute punishes defendants for a status and is a legislatively imposed punishment applicable to an easily ascertainable group without the necessity of a trial. Thus, if those statuses were deemed the elements of a 13-1580 offense, the statute would be unconstitutional as cruel and unusual punishment and a bill of attainder.

II. EQUAL PROTECTION

Section 13-1580 creates two classes of convicted felons – (1) one class of persons who commit felonies while in custody, or while released into third party custody or for specified hours on a pending charge(s), or while released on a pending misdemeanor charge(s), or while not facing criminal charges; and (2) another class of persons who commit felonies while released on bond or recognizance on a felony charge(s). On the basis of this classification, the first class can be found guilty of only one felony for every felonious act committed, but the second class can be found guilty of two felonies for every felonious act committed. Section 13-1580 invidiously discriminates in the following ways: (1) more severe punishment is meted out to those who exercise a state constitutional right to release; (2) the statute punishes because of an incident to an unproved criminal charge (i.e. release on bond or recognizance) and, though released persons are presumed innocent, they are punished more severely than other presumed innocent persons; and (3) by requiring consecutive sentences, it punishes such persons for the commission of one felonious act more severely than are persons

who commit several felonious acts and may serve concurrent sentences.

The class singled out by § 13-1580 is not reasonably related to its purposes, and the statute is not demonstrably necessary to promote a compelling state interest.

ARGUMENTS

I.

PETITIONER'S CONVICTION OF ARIZ. REV.STAT.ANN. §13-1580 SUBJECTED HIM TO DOUBLE JEOPARDY

Ariz. Rev. Stat. Ann. § 13-1580 makes any "person who is convicted of committing any felony offense" also "guilty" of the felony offense set forth therein, provided only that the first offense "is committed while such person is released on bail or his own recognizance on a separate felony charge." That is, a person who is convicted of one felony offense is thereby guilty of two felony offenses. Could there be a more classic definition of multiple jeopardy for the same offense? *See, North Carolina v. Pearce*, 395 U.S. 711, 717 (1969); *Ex parte Nielsen*, 131 U.S. 176 (1889). As the Arizona Court of Appeals stated, for a "*single act*, [petitioner] has been convicted and sentenced for two felony offenses." 21 Ariz.App. at 82, 515 P.2d at 907. (App. 34).

It is important to note that § 13-1580 purports to create a separate crime and does not merely provide for an augmentation of punishment. Thus a conviction

under § 13-1580 is relevant in determining whether and to what extent a recidivist penalty provision, such as *Ariz.Rev.Stat.Ann.* §§ 13-1649 and 13-1650, should apply, and how time credits for good behavior, such as *Ariz.Rev.Stat.Ann.* § 31-251(B), will be computed. An individual's eligibility date for parole is based upon his last sentence rather than the aggregate of his sentences. *Ariz.Rev.Stat.Ann.* § 31-411; 1973 *Ariz.Op.Att'y Gen.* 55 (Op.No. 73-24). It is not clear whether or under what circumstances a reversal of the conviction for the primary offense would mandate a reversal of the conviction for § 13-1580. Unlike a penalty augmentation provision, where some discretion whether to apply the provision rests with the trial court (*see, State v. Jacobson*, 110 Ariz. 70, 515 P.2d 27 (1973)), the sole discretion whether to impose the penalty of § 13-1580 rests with the prosecutor. Because § 13-1580 purports to create a separate offense, a prosecutor, at his whim or design, may charge a defendant with a violation of § 13-1580 after a defendant has been sentenced under the primary conviction or even after a defendant has completed serving his sentence.

It also should be noted that the Constitution demands that one charged with a crime be presumed innocent until proven guilty. *In re Winship*, 397 U.S. 358 (1970). Yet § 13-1580 clearly presumes that one merely charged with a crime and thereafter released is more culpable when he thereafter commits a crime than a person not previously charged or a person previously charged and not released who commits the same crime. (See discussion *infra* at pp. 16-17.)

The Arizona Supreme Court, in rejecting petitioner's claim of double jeopardy, held that the two charges of

which he was convicted, burglary and committing a felony while released on recognizance, were not in law the same offense, but were "entirely different". (App. 48) Without ever indicating what the elements of committing a felony while released on bail or recognizance are, the court declared that "[i]t is quite obvious that the two offenses with which defendant was charged have no common element." (App. 48)

From the context of this case, it is apparent that the defendant's conviction for burglary and for § 13-1580, were jeopardy and punishment for the same offense. And it makes no difference whether the standard used for determining if there is double jeopardy for the same offense is the "same elements test", *Blockburger v. United States*, 284 U.S. 299 (1932), or the "same transaction test", *see Ashe v. Swenson*, 397 U.S. 436, 448-460 (1970) (Brennan, J., joined by Douglas & Marshall, J.J. concurring).

The State's Response to Petition for Writ of Certiorari argued that the elements of a violation of § 13-1580 are completely different from the elements of its foundational felony offense and that the elements of § 13-1580 are as follows:

> "A. Petitioner had been charged with a felony and released on bail OR release [sic]. [It will be noted that § 13-1580 does not appear to apply to a defendant released into third-party custody or on work-release, *Ariz.R. Crim.P.* 7.3(b)(2) & (6)].
> B. That while on release he committed a crime.
> C. That the crime was a felony, and
> D. That he was convicted of his second felony."

Are these in fact the elements of a § 13-1580 violation and do they in fact represent a separate offense?

In determining double jeopardy questions, this Court looks to the substance of the crimes charged. Thus, in *Ex parte Nielsen*, 131 U.S. 176 (1889), charges of plural cohabitation and adultery were found to be the same offense even though the formal charges alleged commission on different dates and adultery required proof of a marriage, which cohabitation technically did not.

From an examination of this case, it is clear that commission, but not conviction, of a felony is an element of a § 13-1580 violation. At the time Cassius was indicted for violating § 13-1580, he had not been convicted of the underlying burglary. Since a person cannot lawfully be charged in anticipation of an offense being subsequently committed, and since the Arizona Supreme Court, after examining the record for fundamental error, affirmed Cassius' conviction, it necessarily must have held that a conviction of the felony is not an element of § 13-1580. Actually, § 13-1580's reference to a conviction is for the purpose of establishing the acceptable evidence or proof of the commission of a felony. The constituent elements of a crime are the same as their sum total, conviction of the crime. Section 13-1580 would have the same meaning if instead of reading "[a] person who is convicted of committing any felony offense", it read "[a] person who is convicted of committing robbery, or burglary, or grand theft, or arson, or any other felony offense."

Further, under Arizona law, the factor of commission while released on a pending felony charge cannot be an element of a crime. A crime "is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction," penal

sanctions. *Ariz.Rev.Stat.Ann.* § 13-101 (1956). The corpus delecti, or elements, of a crime are (1) that a certain result has been produced, and (2) that some person is criminally responsible for the act. *State v. Thomas*, 78 Ariz. 52, 59, 275 P.2d 408, 413 (1954). Assuming competency, the elements of criminal responsibility are an *actus reus* (act or omission) and a *mens rea* (requisite mental state). *See* R. Anderson, *Wharton's Criminal Law and Procedure* § § 60-70 (1957). The fact of being released on bond or recognizance is neither an act or omission on the defendant's part, nor a mental state, nor a consequence of the *actus reus* of *A.R.S.* § 13-1580. It is a status over which the courts have ultimate control, and the release may or may not conform to the defendant's will and volition. To illustrate, it must be conceded that if a court of competent jurisdiction orders a defendant released on his own recognizance, that defendant must be released even though he wishes to remain in jail (and there are such defendants).

If the elements of § 13-1580 were the status of being a person convicted of a felony (as opposed to use of a conviction merely as evidence of the elements of the felony) and the status of having been released on another felony charge when the felony was committed, then the statute would be patently unconstitutional.

Punishment for a status is prohibited by the Eighth Amendment's Cruel and Unusual Punishment Clause, *Robinson v. California*, 370 U.S. 660 (1962), as well as, under circumstances such as those prescribed by § 13-1580 (i.e., application to an easily ascertainable group and punishment without the necessity of an additional trial) by the Bill of Attainder Clause of art.

I, sec. 10 of the Constitution. The State of Arizona can no more make it a separate crime to be a person convicted of a felony committed while released on bail or recognizance for another felony charge than it can make it a separate crime to be convicted of a felony committed while unemployed.

Because petitioner's conviction under *Ariz.Rev.Stat. Ann.* §13-1580 violates the Double Jeopardy Clause of the Fifth Amendment, as applied to the States by the Fourteenth Amendment, that conviction should be reversed.

II.

PETITIONER'S CONVICTION OF ARIZ. REV.STAT.ANN. §13-1580 DENIED HIM EQUAL PROTECTION OF THE LAWS

Art. 2, sec. 22 of the Arizona Constitution establishes release upon furnishing sufficient sureties as a constitutional right. Regarding this right, the Arizona Court of Appeals in its opinion in this case stated:

> "Although bail is conditioned upon the giving of 'sufficient sureties', Rendel v. Mummert, 106 Ariz. 233, 474 P.2d 824 (1970), it is nonetheless a constitutionally protected right. As stated in Stack v. Boyle, 342 U.S. 1, 72 S.Ct. 1, 96 L.Ed. 3 (1951): 'This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. [Citations omitted] Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.'" 21 Ariz.App. at 83, 515 P.2d at 908. (App. 36-37)

Having granted such a right, a state cannot implement it in such a way as to create invidious discriminations. *Griffin v. Illinois*, 351 U.S. 12 (1956). Where a discrimination has the effect of chilling or impairing the exercise of a fundamental right, the discrimination may be characterized as invidious and will only be sustained under the Equal Protection Clause if it can be shown to be demonstrably necessary to promote a compelling state interest. *E.G., Shapiro v. Thompson*, 394 U.S. 618, 634 (1969); *United States v. Jackson*, 390 U.S. 570 (1968); *Williams v. Rhodes*, 393 U.S. 23 (1968); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *In re King*, 3 Cal.3d 226, 474 P.2d 983, 90 Cal.Rptr. 15 (1970); *Spillers v. State*, 84 Nev. 23, 436 P.2d 18 (1968).

The effect of § 13-1580 is to create two classes of convicted felons–(1) one class of persons who commit felonies while in custody on pending untried charges or while released on pending misdemeanor charges or while released into third party custody or for specified hours on pending felony charges or while not facing criminal charges, and (2) another class of persons who commit felonies while released on bond or recognizance on pending untried felony charges. The sole difference between those awaiting trial on felony charges in the two classes is that those in the second class have exercised their constitutional right to complete release. On the basis of this distinction, the second class is found guilty of two felonies for every felonious act committed, while the first class is found guilty of only one. The Arizona Court of Appeals ably illustrated how this discrimination operates:

> "A and B are both arrested and charged with burglary. A is released on bail and B remains in jail. While released, A commits aggravated battery on a police officer. While in jail, B also commits aggravated battery on a police officer. Pursuant to a plea bargain, the original burglary charges against both A and B are dropped in exchange for a plea of guilty to the battery charges. Notwithstanding the fact that A and B have committed identical crimes, A may be convicted of two crimes–(1) aggravated battery and (2) committing a felony while released on bail or own recognizance. However, B can only be convicted of aggravated battery because his crime was committed in jail. Taken one step further, assume that A had been mistakenly accused and was totally innocent of the burglary [sic] charge. Under A.R.S. § 13-1580 he may still be convicted of two criminal offenses for the single battery solely because the act was committed while on bail." 21 Ariz.App. at 84, 515 P.2d at 909. (App. 38-39)

It should be added that the decision whether and when to charge the additional offense of § 13-1580 is left solely to the prosecutor's discretion. (See discussion, *supra* at p. 9)

The Arizona Court of Appeals correctly stated:

> "A.R.S. § 13-1580 not only prescribes different penalties for the same offense, but also creates an additional crime for the same offense, which crime can only be committed after one has exercised his constitutional right to bail.
>
> . . . Making it an offense to be convicted of a felony which was committed while on bail neither helps secure the attendance of a defendant at trial nor insures compliance with the legal processes of this State. It serves no other purpose than to make

bail an instrument of oppression which our Supreme Court has denounced. [*Gusick v. Boies* 72 Ariz. 309, 734 P.2d 430 (1951)]. Our legislature has effectively chilled the assertion of the constitutional right to bail by penalizing those who have chosen to exercise it.

Regardless of the character of the crime, an accused on bail is clothed with the presumption of innocence. *Gusick*, supra. By singling out those admitted to bail, *A.R.S.* §13-1580 strips the innocent of that presumption. One accused of a crime is not *ipso facto* a menace to society as *A.R.S.* §13-1580 seems to presume. Such a presumption erodes the very foundation of our system of criminal justice, namely, the presumption of innocence." 21 Ariz.App. at 85, 515 P.2d at 910. (App. 40).

The Due Process Clause of the Fourteenth Amendment demands that one charged with a crime be presumed innocent, just as one who is not charged, until proven guilty beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970). But, as the Arizona Court of Appeals pointed out, §13-1580 punishes persons who commit a felony only if the felony is committed while released on another felony charge. It matters not whether the charge under which the accused was released is completely frivolous; it matters not that the accused is subsequently adjudged innocent of the charge under which he was released; he is singled out for more severe punishment than other presumptively innocent people. In this sense §13-1580 is distinguishable from recidivist statutes which impose more severe punishment only where a person has been convicted of the prior charge. Punishment which treats one person more severely because of an unproved

charge than it does another presumptively innocent person convicted of the same act invidiously discriminates; the discrimination is not reasonably related to any lawful purposes the statute may be designed to serve and it contravenes the presumption of innocence. *Cf. Rinaldi v. Yeager*, 384 U.S. 305 (1966).

Section 13-1580, though chilling a right hallowed in Anglo-American jurisprudence and protected by the Arizona Constitution, and contravening the Constitutional presumption of innocence, is not demonstrably necessary to promote a compelling state interest. The duty of an individual to obey the law exists and draws its vitality independently of § 13-1580. Release from custody is conditioned upon good behavior, *Ariz.Rev. Stat.Ann.* § 13-1577 (D); such release can be revoked upon a breach of that condition, *Rendel v. Mummert*, 106 Ariz. 233, 474 P.2d 824 (1970), *Ariz.Rev.Stat. Ann.* § 13-1578; and subsequent release can be denied, Arizona Constitution art. 2, sec. 22 (2). The fact that a crime was committed while the defendant was released on another pending charge is certainly a matter which the trial court can take into consideration in determining the severity of the penalty to be imposed. *Cf. Williams v. New York*, 337 U.S. 241, 246-49 (1949); *State v. Killian*, 91 Ariz. 140, 370 P.2d 287 (1962).

Further, § 13-1580 requires that the sentence therein provided be served consecutively to the sentence for the offense committed while on release. Such a requirement of consecutive service of sentences appears nowhere else in the Arizona statutes. There can be no rational basis for allowing one who commits two separate burglaries to serve concurrent sentences on these offenses, while a person who commits only one burglary must serve two

consecutive sentences merely because his burglary was committed while he was released on a pending charge of which he was presumed innocent. Such an unreasonable disparity in sentencing practices and severity, practiced upon a class of persons presumed innocent of the charges for which they were released, who were released as was their right under the State Constitution, also violates the Equal Protection Clause. *See James v. Strange*, 407 U.S. 128 (1972).

Because petitioner's conviction under *Ariz.Rev.Stat. Ann.* §13-1580 violates the Equal Protection Clause of the Fourteenth Amendment, that conviction should be reversed.

CONCLUSION

For the foregoing reasons, the judgment of the Arizona Supreme Court should be reversed and the case remanded with instructions that the judgment of conviction for *Ariz.Rev.Stat.Ann.* §13-1580 and sentence imposed thereon be ordered vacated and the charge of violation of *Ariz.Rev.Stat.Ann.* §13-1580 contained in Count II of the indictment against petitioner be dismissed.

Respectfully submitted,

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NOVEMBER 1974